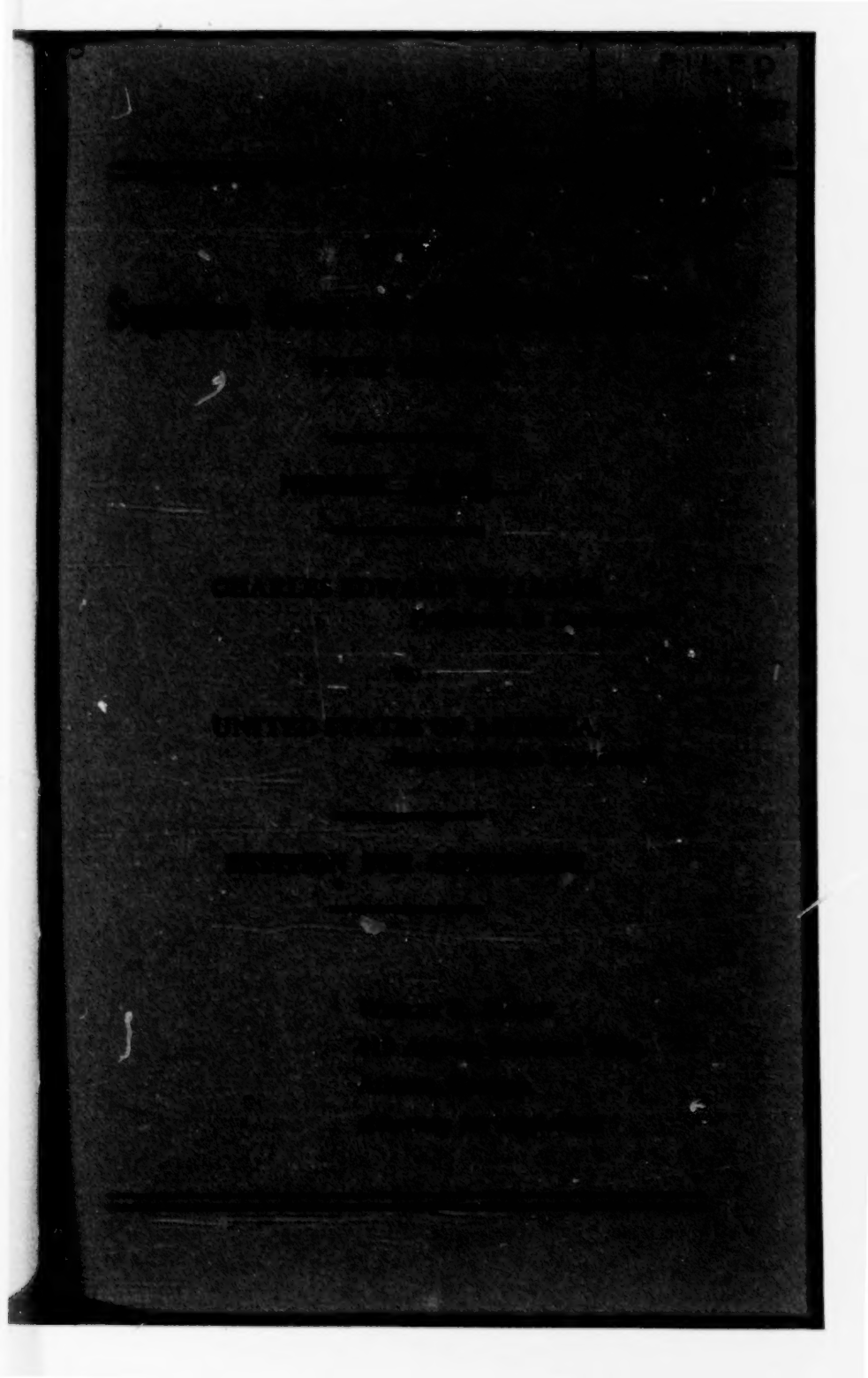

IN THE

Supreme Court of the United States

CHARLES EDWARD WILLIAMS,
PETITIONER IN CERTIORARI
VS.
UNITED STATES OF AMERICA,
RESPONDENT IN CERTIORARI

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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Now comes CHARLES EDWARD WILLIAMS, Petitioner in Certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner was indicted and tried, along with others, in the United States District Court for the Northern District of Georgia, Atlanta Division, on a charge of conspiring to defraud the United States and to violate the Internal Revenue Laws thereof. The indictment charged petitioner with conspiring to violate seven distinct federal offenses, six of which were felonies and the seventh a misdemeanor. The jury was charged by the court to the effect that it was not necessary that the Government prove all the alleged objects of the conspiracy, but that if the jury believed petitioner had conspired to violate any one or more of them they would be authorized to find

him guilty. The petitioner was found guilty by the jury. He was later sentenced by the Court to serve three years in the custody of the Attorney General. His appeal to the Circuit Court of Appeals was based on the fact that the trial judge should have sentenced petitioner to a misdemeanor punishment instead of a felony, because of the charge of the Court to the jury. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court, and later denied a petition for a rehearing.

JURISDICTIONAL STATEMENT

(a) This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit under and by virtue of Title 18, Section 3772 of U.S.C.A. and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S.Ct. XXXIX).

(b) The statute of the United States, the validity of which is involved in this application for certiorari, is as follows:

"Title 18, Section 371, U.S.C.A. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conpiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the pun-

ishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

(c) Judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the trial court was filed November 6th, 1956, and the petition for rehearing in said case was denied by said Court on December 7th, 1956. This petition for certiorari is being filed in this Court within thirty (30) days from the judgment denying the petition for a rehearing.

(d) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:

(1) The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this court.

(2) The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

THE QUESTIONS PRESENTED

Petitioner was tried on a conspiracy indictment charging the petitioner with conspiring to violate seven different objects in one count. Under the conspiracy statute of 1948, hereinbefore quoted in the jurisdictional portion of this petition, a maximum of five years imprisonment is provided for conspiring to violate any felony, whereas a conspiracy to violate a misdemeanor the punishment

shall not exceed the punishment provided for such misdemeanor. The trial judge did not require the Government to prove, nor the jury to find, that the petitioner had conspired to violate all of the alleged objects of the conspiracy indictment in order to convict. Therefore, when the jury brought in a verdict of guilty on this count, did the verdict properly construed, find the defendant to have conpired to violate all the alleged objects or just one of them? If the jury had only deliberated as to the misdemeanor object, under the charge of the court, and had returned a verdict based upon their findings as that that object alone, the petitioner was entitled to the benefit of the doubt on the sentence.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The United States Court of Appeals for the Fifth Circuit, in deciding this case, conceded that the question presented was novel. The Court of Appeals ruled:

"It arises doubtless because of a relatively recent change in the punishment provisions of the Federal conspiracy statute."

Under prior rulings of the Circuit Courts in conspiracy cases it was proper for the trial judges to charge the jury that they need only find that a defendant conspired to violate any one or more of the alleged objects in order to authorize a conviction. Such being the law, it would not have been feasible, as ruled by the Court of Appeals in this case, to have excepted to the court's charge. Petitioner avers that he should have been given the benefit of the doubt on the sentence, and should have been sentenced as for a misdemeanor only.

APPENDIX

Petitioner herein appends to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Repectfully submitted,

WESLEY R. ASINOF
Attorney for Petitioner.
419 Atlanta National Building,
Atlanta, Georgia

JUDGMENT

Extract from the Minutes of November 6, 1956

No. 16101

CHARLES EDWARD WILLIAMS,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16101

CHARLES EDWARD WILLIAMS,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(November 6, 1956.)

Before TUTTLE, CAMERON and JONES, Circuit Judges.

TUTTLE, Circuit Judge: The appellant here complains of his sentence of three years upon conviction of one count of conspiracy alleging the object of the conspiracy to be the violation of seven distinct provisions of the liquor laws, of which, as substantive offenses, six would be felonies and one a misdemeanor. Admitting that there was substantial evidence from which the jury could have found him guilty of conspiring to violate each

of the seven sections, appellant says that the jury's simple verdict of guilty on the charge of conspiracy, under the charge of the court that they need not find the accused guilty of conspiracy to violate more than one of the sections for a verdict of guilty, left open the possibility that the jury convicted him of that part of the conspiracy to violate the misdemeanor statute only, and for such a verdict the maximum permissible penalty was thirty days in jail and $1,000 fine.

This is a novel question. It arises doubtless because of a relatively recent change in the punishment provisions of the Federal conspiracy statute. Prior to 1948 the law provided that conspiracy to violate *any* Federal criminal statute was punishable by a sentence of two years. This statute, which permitted the Government to turn into a felony what was stated to be a misdemeanor by merely charging that two or more persons conspired to violate the misdemeanor statute, was changed in 1948. The law now authorizes maximum punishment of 5 years and $10,000 fine, but it also provides that if the object of the conspiracy is to commit a misdemeanor *only* the punishment should not exceed that prescribed for the misdemeanor.[1] There is, however, nothing in the language of the new statute to suggest a change in the rule of the case of *Braverman v. United States,* 317 U. S. 49, that a single agreement is a single crime, no matter how many

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1 "§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C.A. §371.

illegal objects it encompasses, and even if some of them are felonies and other misdemeanors. In 1948 conspiracy became a crime with two degrees: a felony if even one of the objects is a felony, a misdemeanor otherwise.

The indictment here charged "that . . . defendants did . . . conspire . . . to commit certain offenses against the laws of the United States, to-wit: . . . ." Then followed seven numbered paragraphs, each of them describing the violation of a separate provision of the liquor laws. Six of them related to felonies; one of them, that charging possession of property intended for use in the manufacture of spirits, related to a misdemeanor, for which the maximum punishment is 30 days imprisonment and $1,000 fine.

At the conclusion of the trial in which appellant concedes there was sufficient evidence on which the jury could have found a conspiracy to violate all seven offenses, the jury found a general verdict of "guilty." Before submitting the case to the jury the court charged:

> "It is not necessary, as I will charge you later, that the Government should prove all of these overt acts, or all of these alleged purposes of the alleged conspiracy."

And later:

> "So you would take these various alleged defendants and see if any one of these defendants, there are seven of them named, if either one of these defendants named conspired with any other defendants named or conspired with any other person who is not a defendant, who is named in here as an alleged conspirator, to

violate ony one or more of the provisions of law enumerated, starting with the letter (A) and going through (G) and then if you find such agreement was made between such persons, then go further and see if any one or more of these persons who entered into such alleged conspiracy did any one or more of the overt acts toward the furtherance of the conspiracy as set out in the indictment."

No requests to charge were made, and appellant took no exception to the court's charge as given. Nor did the appellant object to the form of the indictment nor request a clarification of the verdict nor request a new trial on the ground of an incorrect charge.

It is not disputed by the appellant that in a conspiracy prosecution the judge may properly charge the jury that it need not find the accused conspired to commit all of the offenses charged in the indictment. This being the rule of law applicable to such a trial, it must have been apparent to the accused, upon arraignment and at all times thereafter, that there should be some effective separation of the misdemeanor offense from the six felony offenses in the consideration by the jury. It was open to appellant in the light of this rule of law to object to the form of the indictment.[2] This he did not do.

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[2] Contrary to the contention of the Government, the decisions in Braverman v. United States, 317 U.S. 49, and in Frohwerk v. U. S., 249 U.S. 204, do not require that all the illegal objects of a conspiracy be set forth in a single count of the indictment. Frohwerk merely held that a count is not bad for duplicity for alleging a conspiracy with two illegal objects, and Braverman states that even if the illegal objects of a single conspiracy are set forth in several counts only a single punishment may be imposed. Both these decisions antedate the 1948 change in the conspiracy statute. Under the present law it would appear to be the better practice to list all the felonies and all the mere misdemeanor objects of a conspiracy in separate counts, to avoid the complications that gave rise to this case.

Having failed to do that, he could then have requested a charge to the jury that would have called either for a special verdict or for a verdict indicating the degree of the offense under Rule 31 (c). Such a charge could have required the jury to specify which offense or offenses they found the conspiracy was concerned with if they found the accused guilty. Appellant did not ask for this. Moreover, he was silent, making no objection to the charge as given which clearly told the jury that they could convict him of the crime of conspiracy if they found the object of the conspiracy to be the violation of any one of the seven offenses named in the indictment, thus putting him in the danger of being found guilty without any ascertainment of which degree of criminality was found. In the light of the law affecting the measure of punishment, any error in this charge should have been called to the court's attention in order that it could have the jury pass on this important issue, either by requiring a special verdict or by limiting their general verdict to a designated degree of the offense. See *Kaye v. U.S.* (7 Cir.), 177 Fed. 147, for decision of a somewhat related question.

Thereafter, when the jury had returned its verdict of guilty without any indication which of the offenses they had found the accused had conspired to commit, there was a further opportunity for counsel to ask the court to have this matter clarified. *Anderson v. U. S.* (2 Cir.), 294 Fed. 593; *Bernhardt v. U. S.* (6 Cir.), 169 F. 2d 283. This he failed to do.

The failure of counsel to call to the attention of the trial court in any manner his concern lest a general verdict of guilty might result in the imposition of the higher sentence, whereas a conspiracy to violate the mis-

demeanor would justify only a thirty day sentence, emphasizes the reason for Rule 30 of the Federal Rules of Criminal Procedure to the effect that

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Here, it was only after the jury's verdict had been recorded and the jury discharged that the court's attention was called to the possible jeopardy to accused of letting the case go to the jury in the manner it did.

Although this court may consider an appeal from clear and prejudicial error even when such error is not called to the attention of the trial court, or is not "preserved," as we say, we are not disposed to do so unless to correct manifest injustice. We do not think this is such a case.

The situation here, at the conclusion of the trial, after the jury's verdict had been recorded, was much the same as results when a jury returns a verdict of "guilty" on a murder indictment where it has the power to find the accused guilty of a lesser included offense. Rule 31 (c), Federal Rules of Criminal Procedure, provides, as did the statute formerly, that:

> "(c) *Conviction of Less Offense.* The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an of-

fense necessarily included therein if the attempt is an offense."

The defendant's position here is even weaker than that presented to the Supreme Court in *St. Clair v. U. S.*, 154 U.S. 134. There the trial court refused a request to charge the lesser includible offense law which was available to the accused. The proper exception, which was then required, was not taken, and the Supreme Court held that although the jury could properly have found the accused guilty of a lesser offense than murder its general verdict of guilty would be construed as if it had used the added words "as charged in the indictment." Here, of course, if we are to import the words "as charged in the indictment," it is clear that the verdict supports a sentence as for a conspiracy to commit a felony.

We have been unable to find any decided cases precisely in point on the matter raised by this appeal. We think, however, that the decision of this court in *Huff v. U. S.* (5 Cir.), 192 F. 2d 911, points the way in which we should proceed. The Huff case involved the question as to whether the longer sentence for a conspiracy conviction following the passage of the 1948 amendment could stand when the indictment charged, and proof was adequate to support the charge, that some of the overt acts had been committed before the law was amended. This court held that the conspiracy was a continuing crime, being an agreement coextensive in time with the overt acts, and since acts alleged in the indictment also occurred after the law was amended, and since but one crime was involved, the verdict of guilty comprehended the agreement and the acts at every stage of the alleged conspiracy. Neither at the trial nor on appeal did the defense raise

the point that the jury's verdict of guilty was not necessarily based on any of the overt acts alleged to have occurred after the law had been amended. See also *Rosenberg v. U. S.*, 346 U.S., 273, 295, 299, 304.

There is yet another reason why no relief may be granted to this appellant. His theory in effect is that the instructions of the court, applied to the indictment, reduced the charge to that of a misdemeanor, and that the jury verdict therefore means: "guilty of misdemeanor conspiracy." He asserts that there was no error in either the indictment or the charge, at least no error to which he was obliged to object as prejudicial to his position. Thus he accepts the verdict as valid and the only relief he requests is to have his sentence conformed to his interpretation of the verdict. This is similar to relief that, if appropriate, might be granted under either Rule 35 or under 28 U.S.C.A. §2255.

Here, however, such relief is not appropriate. The sentence was a valid sentence on a verdict of guilty of felony conspiracy. The verdict must be read as guilty "as charged in the indictment," *St. Clair v. United States, supra,* and here the indictment, even if perhaps technically defective, charged a felony. The court did not, by its erroneous instructions, change the degree of the crime charged in the indictment, as it could have done by striking each of the felony objects and instructing the jury to disregard them—for unless they were thus stricken the jury, under the appellant's theory, could convict him of a misdemeanor upon evidence of a felony. Appellant cites no authority for his proposition that a verdict should be read in light of the charge rather than in light of the indictment. The rule appears to be that if a verdict is

patently ambiguous some rules of construction may be applied to it, principal among which is the rule of guilty of the highest degree of the crime charged, *Craemer v. Washington State*, 168 U.S. 124, *St. Clair v. United States, supra;* if these are inadequate the verdict must usually fall entirely. *United States v. Di Matteo* (3 Cir.), 169 F. 2d, 798; *United States v. Crescent-Kelvan Co.* (3 Cir.), 164 F. 2d, 582; *Soper v. United States* (9 Cir.), 27 F. 2d, 648. There is, however, no authority for importing latent ambiguities into the verdict by reference to the charge or to the evidence—if those are such as to make the verdict ambiguous they are erroneous and the verdict must fall for error at the trial, unless the error is waived by the defendant. There is no power in the trial or the appellate courts to speculate about what the jury might have based their verdict on in view of the erroneous charge, and here the appellant wishes this Court to take the 1:126 chance that the jury found him guilty only of a misdemeanor.

Defendant does not ask for a new trial on account of errors committed at the trial—he asserts that there were no errors prejudicial to him. He has not moved for a new trial in the district court on this ground, and nothing in the record before us shows that this matter was even brought to the attention of the trial judge, though in the argument both counsel agreed that the matter had been discussed extensively with the court before sentence was imposed. In view of appellant's limited request for relief it is not clear that this court could order a new trial without infringing appellant's right to be free of double jeopardy, particularly since a new conviction could result in a sentence of up to five years imprisonment. It is, of course, established that where a new trial is granted

at the initiative of the defendant who has moved to void a judgment imposed on him he cannot claim double jeopardy; but here appellant asserts the validity of the verdict and therefore it is not certain that his request for a reinterpretation of the verdict and consequent change in the sentence is a sufficient waiver of his right not to be tried again to enable this Court to make such an order.

In brief, the relief requested, a reduced sentence, is one that this Court cannot give in this case. The relief that would normally be available upon the facts found here, a new trial, is neither desired by the appellant, presumably because of the apparent risk, nor does he assert any grounds upon which it could be granted since he claims that there were no errors at the trial, nor has this Court been able to find any grounds why his waiver of the errors at the trial should be excused. Defendant cannot escape his proper punishment by causing or negligently permitting error in his trial, then refusing to appeal for a new trial free from error, and finally asserting that the error was in his sentence rather than at the trial. The Supreme Court has held that: "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza v. United States*, 330 U.S. 160, 166-67, and similarly there is no reason why a criminal defendant should be permitted to condone error by silence, prevent complete reconsideration by failure to request a new trial, and then assert the same error upon tenuous grounds for the limited purpose of emasculating a verdict admittedly based on sufficient, legal evidence.

We conclude that such jeopardy as faced the accused

was inherent in the form of the indictment and his failure to seek relief by way of motion to correct the indictment, or by any action at the time of the court's charge or after verdict, worked an effective waiver of such error as occurred.

The judgment is

AFFIRMED.

A True Copy:
Teste:

JOHN A. FEEHAN, JR., Clerk
By Gilbert F. Ganuchian, Deputy
Clerk of the United States Court
of Appeals for the Fifth Circuit.

IN THE

Supreme Court of the United States

CHARLES EDWARD WILLIAMS,

Petitioner in Certiorari

vs.

UNITED STATES OF AMERICA,

Respondent in Certiorari

BRIEF OF LAW BY PETITIONER IN CERTIORARI

STATEMENT OF THE CASE

Charles Edward Williams, hereinafter designated as Petitioner, was jointly indicted in the United States District Court for the Northern District of Georgia, Atlanta Division, with several other persons for the offense of conspiring to violate the internal revenue laws of the United States on count number one; having in possession and custody and under control a still and distilling apparatus without having the same registered on count number two, and carrying on the business of a distiller with intent to defraud the United States on count number three.

To this indictment petitioner and four other named defendants entered their pleas of not guilty and the case proceeded to trial before a jury with the Hon. Frank A. Hooper, Jr., Judge of said Court presiding. The trial

resulted in a mistrial as to all the other defendants except petitioner, who was found guilty by the jury on the first count charging conspiracy. The court granted a judgment of acquittal as to the second count and a mistrial was had as to the third count as to petitioner.

Insofar as the first count, charging conspiracy, is concerned, petitioner was charged with having conspired to defraud the United States and to commit certain offenses against the laws of the United States. The indictment then alleges seven (7) different and distinct objects or purposes of the conspiracy, lettering them from (a) through (g), (Record pp. 2, 3.) Objects a, b, c, d, e and g, as set forth in the indictment, allege violations of felony statutes, but object lettered (f) in said count is as follows:

> "(f) To unlawfully, wilfully and knowingly have and possess property intended for use in the manufacture and production of non-tax-paid distilled spirits, in violation of the Internal Revenue Laws with respect to such distilled spirits, in violation of Sections 3116 and 3115, Title 26, U.S.C.A."

The object lettered (f), hereinbefore quoted, alleged the violation of a misdemeanor.

The court sentenced petitioner to serve three years in the custody of the Attorney General.

SPECIFICATIONS OF ERRORS RELIED UPON

1. The court erred in sentencing appellant to serve three (3) years in the custody of the Attorney General, in that the maximum lawful sentence that should have been imposed by the court was thirty (30) days. Petitioner shows that the indictment on the conspiracy count mingled felony objects with a misdemeanor object; that

the court charged the jury that it was not necessary that the Government should prove all of the alleged purposes of the conspiracy (Rec. p. 803), but that the jury should undertake to determine if defendant conspired "to violate any one or more of the provisions of law enumerated, starting with the letter (A) and going through (G), (Rec. p. 814);" that the jury returned a general verdict finding petitioner guilty "On Count One;" that the Government offered proof of the alleged object lettered (F); and that the Court was unable to determine whether or not the jury found petitioner guilty of all the objects of the conspiracy or just one of them, and if just one of them, was it the misdemeanor object lettered (F).

ARGUMENT AND BRIEF OF LAW

In the case at bar the Court is not concerned with a substantive offense. The charge upon which the petitioner was convicted was *conspiring* with other persons to violate *certain federal laws*. Primarily and fundamentally, then, it could not be said to be a violation of the conspiracy law as enacted by Congress unless one conspires to violate *some provision of the federal law*. In this case the Government contended in their indictment that the petitioner conspired to violate seven (7) different federal laws, and sought, by their bill of indictment, to so charge him.

The petitioner, by his plea of not guilty, denied each and every one of these allegations. In other words the petitioner denied that he conspired to violate *any one* of the objects therein set forth. The trial court, in its charge to the jury on this question, did not require the jury to deliberate independently on each of the alleged objects of the conspiracy, but deemed it quite sufficient if the

jury found that petitioner had conspired to violate "*any one or more*" of the alleged objects, not to make further inquiry or investigation as to the remainder.

The conspiracy statute under which this case was tried was enacted June 25, 1948, and is known as Section 371, Title 18, U.S.C.A., and is as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.
>
> *"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."*

Now, then, where as in the case at bar the offense of possessing property intended for use in the manufacture and production of non-tax-paid distilled spirits, as alleged in object (F), *and the commission of which is one of the objects of the conspiracy, is a misdemeanor only, "the punishment for such conspiracy shall not exceed the maximum punishment provided for such a misdemeanor."*

The Supreme Court held, in the case of *United States v. Dixon*, 74 S. Ct. 566:

> "We think the plain language of the two sections (3115 and 3116) read together can lead only to the conclusion that the acts prescribed in #3116 not only may result in forfeiture but likewise are made crim-

inal and punishable under the general penalty provisions of #3115," and preceding this statement, the Court said:

> "Section 3115 bears the caption 'Penalties' and provides that anyone violating any of the provisions of 'this part' for which offense a special penalty is not prescribed 'shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both'."

Thus it is clear that if the petitioner conspired to violate any of the felony objects contained in the conspiracy count he could have lawfully been sentenced by the court to a maximum of five years in the custody of the Attorney General, whereas, if he had conspired to violate what is commonly known as the "raw material" statute he could have received no more than the maximum punishment provided for such misdemeanor, which is not to exceed $1,000, or imprisonment not exceeding thirty days, or both.

Of course, it is true that the general rule applicable in most jurisdictions, and conceded to be the rule in the federal courts, is that a finding of guilt in an indictment returned on a general verdict of guilty is construed to be a verdict of guilty as to all counts. It would also logically follow, and is conceded by the petitioner to be correct, that a verdict of guilty on a conspiracy count would, properly construed, mean guilty of everything that is charged in that count. However this may be, the general rule can not apply in the case at bar, because the *charge of the court removed the case from the general rule* and must act as the yardstick with which the intent of the jury can be ascertained.

Where, as here, the Court charged the jury that

> "It is not necessary, as I will charge you later, that the Government should prove all of these overt acts, or all of these alleged purposes of the alleged conspiracy" (Rec. p. 803).

and later on in the charge, instructed the jury as follows:

> "So you would take these various alleged defendants and see if any one of these defendants, there are seven of them named, if either one of these defendants named conspired with any other defendants named or conspired with any other person who is not a defendant, who is named in here as an alleged conspirator, *to violate any one or more of the provisions of law enumerated, starting with the letter (A) and going through (G)* and then if you find such agreement was made between such persons, then go further and see if any one or more of these persons who entered into such alleged conspiracy did any one or more of the overt acts toward the furtherance of the conspiracy as set out in the indictment" (Rec. p. 813).

then a finding of guilt by the verdict of the jury can not be construed to mean that the jury found the petitioner guilty of *all* the alleged objects or purposes of that conspiracy count, but can only mean that which the charge of the court instructed it to mean to-wit: that the jury found the petitioner guilty of conspiring to violate *one or more* of the alleged objects or purposes of the conspiracy, and not *all* of such alleged objects or purposes.

In attempting to construe the verdict of a jury where it is susceptible of two constructions, how can the court arrive at the intent of the verdict in any better way than to scan the charge of the court, and under the charge of the court in this case it was not necessary for the jury to go further in its deliberations other than to determine if

the petitioner had conspired to violate *any one or more* of the alleged objects of the conspiracy, and then to determine further that one of the conspirators had committed any one or more of the alleged overt acts, in order to warrant the verdict of guilty.

It may very well have been true that the jury could have eliminated, in their deliberations, all six of the alleged felony objects and may have believed the petitioner to have been not guilty of conspiring to violate any of them. It may very well also be true that the jury were of the opinion, and so found by their verdict of guilty, that petitioner was guilty beyond a reasonable doubt of conspiring to violate the misdemeanor object, commonly known as the "raw materials" statute. If such was true, then the court could not have lawfully imposed a sentence to exceed a fine of $1,000, or imprisonment for not more than thirty days, or both.

To put the question another way, can the court say that the jury found by their verdict that petitioner conspired to violate *all t*he alleged objects of the conspiracy where the instructions authorized the jury to find petitioner guilty if they found that he conspired to violate *any one or more* of them? Can the Court now say that the jury determined by its verdict that petitioner conspired to violate one of the alleged felony statutes when the Court specifically authorized the jury to find the petitioner guilty generally if they believed he conspired to violate any one or more of the alleged statutes, one of which was a misdemeanor?

The question raised is a novel and unique one. Prior to 1948 the federal statute as to conspiracy cases treated all conspiracies alike. The punishment then was two

years for any conspiracy whether its object was a felony or a misdemeanor. Because of the manifest unfairness, Congress, in 1948, enacted the new statute providing a different penalty. How can anyone, at this time, know what was in the minds of the jurors, except what was expressed by their verdict, measured by the charge of the court?

In the case of *Miller v. Terr. of Oklahoma,* 149 Fed. 330 it was said:

> "As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged, in favor of the liberty of the citizen."

The peculiarity of the new federal conspiracy statute lies in the fact that it contains two separate penalty provisions. This requires the trial judge to more fully ascertain the pleadings before pronouncing sentence to see if the defendant was convicted of one or the other of the provisions of the statute.

However, a very similar case from Texas is the case of *Marshall v. State,* 4 Texas Appeals, 549, wherein the statute denounced an offense in two sections each prescribing a different grade. It was held that where the jury desires to convict for the lesser offense, the verdict should expressly acquit of the greater offense, *but a general verdict* of guilty, without specifying the offense, in legal effect acquits of the higher, and convicts of the lower, degree of the offense where, *by reference to the charge of the court, the intention of the jury is manifest.*

The indictment in this case can be likened to a charge of a higher and lower degree of the same offense. A conviction for conspiring to violate a felony would be the

higher grade, and a conviction for conspiring to violate the misdemeanor would be the lower grade. Where the verdict is in doubt, the benefit of that doubt should be given to the defendant.

In Volume 89, Corpus Juris Secundum, p. 213, it is said:

> "Where because of ambiguity in the verdict it is doubtful which of two sums was intended to be awarded as damages it will be presumed that the lesser amount was the one intended."

Surely, if the civil law recognizes that an ambiguous verdict should be construed in favor of the defendant, then the rule would hold true as to the criminal law where the liberty of a person is at stake.

The record in this case illustrates not only that there was a bare possibility that the jury only considered the misdemeanor object of the conspiracy count in arriving at a verdict, but that such was a strong likelihood. On page 804 of the record, the trial court instructed the jury as follows:

> "The federal law provides that if two or more persons conspire either to commit *any* offense against the United States, or to defraud the United States *in any manner*, or for *any purpose*, and one or more of such parties do any act to affect the object of the conspiracy, *then each shall be punished as provided by the statute*."

What type or method of punishment was the court speaking of when he charged the jury that a convicted conspirator would be punished as provided by the statute? Clearly the court recognized that the punishment was left to the court after a conviction. The jury were not

authorized to separate their verdict so as to specify the unlawful object of the conspiracy that they were to convict the defendant for conspiring to commit. The jury were concerned only with the question of whether or not the defendant conspired to commit *any* offense alleged in the conspiracy count, or to defraud the United States *"in any manner, or for any purpose."* Once the jury found this fact to have been proved beyond a reasonable doubt they were not required to deliberate further.

The trial court again urged the jury on this point as follows:

> "However, it is not necessary for the Government to prove that the conspiracy included *all of the unlawful purposes named*, nor the commission of all the overt acts alleged in the indictment, nor that all the conspirators named therein were engaged in the conspiracy" (Rec. p. 811).

On page 812 of the record, the Court charged:

> "In deciding whether conspiracy existed or not, it is not necessary that it should be proved beyond a reasonable doubt that it existed *in all the details* with respect to all the persons, *or all the objects alleged in the indictment.*"

Here again the court instructed the jury, in order to simplify their deliberations, that it would not be necessary for them to find that the conspiracy existed "with respect to all the persons" named in the indictment, and that it was not necessary for them to find that it existed "in all the details" set forth in the bill of indictment, and that it was also not necessary for them to find that *all* of the alleged overt acts were proved, and, finally, that it was not necessary that the conspiracy existed to violate *"all the objects alleged in the indictment."*

The jurors were vitally concerned with this charge of the court. At 3:25 P.M. the jury commenced their deliberation on the case. (Rec. p. 822). At 4:35 P.M. the Foreman of the jury desired further instructions from the Court as to the definition of a conspiracy. (Rec. p. 823). The court then defined a conspiracy to the jury. The Foreman then inquired of the Court as follows:

> "Does that complete the offense against all of the people, or against the one who committed the overt act?"

The Court then proceeded to answer this question, and at the completion of the answer by the Court another Juror stated:

> "Yes, I would like to ask one. You said two or more persons. Do those persons have to be the named defendants, or co-conspirators?"

The Court then answered that question. The questions asked by the jurors will probably serve to illustrate our point more clearly. The jury, upon reaching a verdict, returned a guilty verdict as to this one petitioner. A mistrial was declared as to the remaining defendants on trial. Consequently the jury must have found, by their verdict, that the petitioner had entered the alleged conspiracy with some alleged co-conspirator *who was not named as a defendant*, otherwise they would have also found one other named defendant guilty. Therefore, this must be considered as a closed case. The evidence did not demand the verdict. The petitioner should be given the benefit of the doubt on the sentence.

Undoubtedly the contention will be made by counsel for the Government in this court, as it was in the trial court, that an exception should have been taken by peti-

tioner to the charge of the court. However, such contention is untenable for two different reasons. First, an exception to a charge of the court is not good unless the charge is prejudicial and harmful to the accused. Second, if the charge was calculated in any way to harm the Government, they could have taken exception thereto by calling the court's attention to the charge.

Petitioner wishes at this point to make their position clear as to the charge of the court, however. *We do not contend that the charge was erroneous.* We do contend, though, that the record of the case *fails to show* that petitioner was found guilty by the jury of conspiring to violate *any felony statute.*

The bill of indictment was drawn and prepared by the Government. The charge was delivered by the Court to the jury. The jury returned their verdict in accordance with that charge. The only question then remaining for the Court to decide was a legal one, to-wit: What is the measure of punishment prescribed by law for the offense with which the petitioner was lawfully convicted?

The verdict as measured by the charge of the court was ambiguous. Did the jury find petitioner guilty of conspiring to violate a felony or a misdemeanor? The secret shall remain forever buried in the breast of the jurors who returned the verdict. The only answer to such a verdict can only come after the court shall decide whether such an ambiguity shall be construed in favor of the defendant or the Government.

In the case of *Christiansen v. U.S.*, 52 Fed. 2nd, 950, the appellant was charged with conspiracy to commit five federal offenses. The appellant contended that the evi-

dence failed to connect him with the conspiracy to commit four of the offenses alleged. There was no dispute as to one of the offenses. The court charged the jury that appellant would be guilty if he conspired to commit either of the offenses alleged. The appellant assigned error on the charge. The Fifth Circuit Court of Appeals held:

> "His contention is that, as the indictment alleges a single conspiracy, all the objects of it had to be proved as alleged in order to sustain a conviction, because otherwise there would be a fatal variance between the allegation and the proof. In Bailey v. United States, 5 F. 2nd, 437, this court held that where, as here, the objects of a conspiracy are separable, it is not a good objection that the indictment charges more than was or could be proved, if what is well alleged constitutes an offense. * * * *
>
> "The conclusion is that the trial court did not err in refusing to direct a verdict for appellant, *or in charging the jury that he could be convicted if he were a participant in the conspiracy to smuggle intoxicating liquors into the United States, although he was not a party to the unlawful agreement to commit the other offenses alleged in the indictment.*"

The Christiansen case, supra, authorized the trial judge in the case at bar to charge the jury as he did that they would see if defendant conspired to violate "any one or more" of the alleged objects of the conspiracy, and therefore the charge was not erroneous. However, when the Government sought, by their bill of indictment, to charge the appellant with having conspired to violate several statutes, one of them being a misdemeanor, in the same count, without requesting the court to require the jury to specify the object of the conspiracy that they

convicted the appellant of, the Government thereby created the situation which rendered the verdict ambiguous.

The Government could have corrected the situation here involved by three different means. (1) By having eliminated the misdemeanor object from their bill of indictment charging conspiracy; (2) By pleading the conspiracy in separate counts as to each alleged object, thereby requiring the jury to deliberate separately as to each alleged object specifying in their verdict the count that they convicted appellant on; or (3) by requesting the court to charge the jury to return a form of verdict specifying the alleged object upon which they wished to convict the appellant.

The Government should not be permitted to remain silent as to this matter throughout the trial of the case, and then ask the trial court to sentence the petitioner to a felony sentence where a misdemeanor sentence is authorized by the pleadings.

The verdict of the jury does not stand upon the same footing as a plea of guilty would, according to the entire record of the case. If the petitioner had entered a plea of guilty, this would have been tantamount to an admission that he was guilty of conspiring to violate *all the alleged objects* therein contained, but his *plea of not guilty forms the issue on all of the same objects alleged*, and the verdict of the jury when construed in connection with the charge of the court *cannot be clearly said to embrace all of the alleged objects.*

The Government will rely strongly upon the case of *Huff v. United States,* 192 Fed. 2nd, 911, as authority to

uphold the duration of the sentence in this case. However the Huff case is not in point. In the Huff case the appellant was charged with conspiracy. The indictment alleged thirty overt acts were committed by the conspirators in pursuance of the conspiracy. The first twenty-two alleged overt acts were committed prior to the Act of 1948 changing the punishment from two to five years. The last eight alleged overt acts were committed subsequent to the passage of the 1948 Act. The indictment alleged a *continuous conspiracy*. Appellant was found guilty by the jury and sentenced by the court to serve a sentence exceeding two years in accordance with the new law. The point was raised by the appellant that "persons so conspiring are subject to prosecution upon the commission of the first overt act; that, therefore, the offense was completed while Section 88 was still in effect; and that any law passed after commission of the offense which inflicts greater punishment for the act that was provided by law at the time the offense was committed is *ex post facto* and unconstitutional."

This was the question raised in the Huff case. In rejecting the theory that the new law was "ex post facto" as applied to the appellant, the Court held:

> "It is here alleged in the indictment, and supported by proof and verdict, that the conspiracy set forth was continuous and, being so, it is not a case where the appellants were subjected to a greater penalty for committing a crime which had been consummated before the statute increasing the penalty was passed and became effective."

It is to be here noted that in the Huff case the only question raised by the appellants was that the new law was *ex post facto* as applied to them because the con-

spiracy was *alleged to have been formed* prior to the new law. The decision of the Court turned on the fact that the formation of the unlawful agreement was not the completion of the conspiracy, but that the offense needed the overt acts to be consummated. This Court said:

> "The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy, * * * *. The successive overt acts are but steps toward its accomplishment." * * * *
>
> "It is this reasoning which lies behind the recognized rule that the statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy of which there is appropriate allegation and proof."

No question appears to have been raised in the **Huff** case as to whether or not the trial judge limited the jury's deliberation to acts committed either before or after the passage of the Act of 1948. The only question there raised appears to be the question of the law being *ex post facto*.

In the cast of *Moss v. United States*, 132 Fed. 2nd, 875, a conspiracy indictment was drawn in seven counts, although the allegations embraced one general conspiracy. The counts were divided as to each alleged object of the conspiracy. Upon a general verdict of guilty the trial court imposed a sentence of ten years under the act providing a maximum of two years for conspiracy. In setting this sentence aside as being excessive, the Court said:

> "Such proof as there was of concert of action between Moss and others, from which reasonable inferences might be drawn of unlawful agreement or

> conniving, points to but a single continuing agreement though embracing a multiplicity of criminal objectives."

In the case at bar the conspiracy count charged both a felony and a misdemeanor. There was no effort by the court to require the jury to separate their findings, nor any motion by the Government to require the jury to do so. Therefore the verdict of guilty can properly be said to embrace a conviction for a misdemeanor conspiracy. In 24 CORPUS JURIS SECUNDUM, p. 98, it is stated:

> "Certainly, it is error for the court to pronounce judgment as for a felony where the verdict finds accused guilty of a misdemeanor."

The following cases are therein cited in the footnote:

State v. Goodwin, 217 S.W. 264, (Mo.)

McComas v. Warth, 167 S.E. 96, (113 W. Va., 163.)

This case should be remanded back to the trial court with directions that the Court amend the sentence so as to conform with the limits of punishment prescribed for conspiracy to violate the raw materials statute.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 682

CHARLES EDWARD WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 837–847; Pet. 7–17) is reported at 238 F. 2d 215.

JURISDICTION

The judgment of the Court of Appeals (R. 848; Pet. 6) was entered on November 6, 1956. A petition for rehearing (R. 849–851) was denied on December 7, 1956. The petition for a writ of certiorari was filed on January 7, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

A jury found petitioner guilty on a charge of conspiracy to defraud the United States and to violate seven named sections of the revenue laws, six of which, as substantive violations, would have been punishable as felonies. Petitioner requested no clarification of the verdict. The question is whether the court correctly imposed sentence for conspiracy to commit a felony where the evidence made petitioner the central figure of the conspiracy and was irreconcilable with a theory of conspiracy to violate only the section punishable as a misdemeanor.

STATUTES INVOLVED

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 U. S. C. 2803, 2810, 2833, 2834, 3115, 3116, 3253, 3321 provided in pertinent part:

> § 2803. * * *
>
> No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the im-

mediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *

* * * * *

(g) * * * Any person who violates any provision of this section * * * shall * * * be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

§ 2810. * * *

Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.

* * * * *

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

§ 2833. * * *

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. * * *

§ 2834. * * *

No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *

§ 3115. * * *

Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this part and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this part or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprisonment of not less than thirty days nor more than one year. * * *

§ 3116. * * *

It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. * * *

§ 3253. * * *

Any person who shall carry on the business of a brewer, rectifier, wholesale liquor dealer, retail liquor dealer, wholesale dealer in malt liquors, retail dealer in malt liquors, or manufacturer of stills, and willfully fails to pay the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills

or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or enclosure connected therewith and used with or constituting a part of the premises, shall be forfeited to the United States.

§ 3321. * * *

Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both.

* * * * *

STATEMENT

In the United States District Court for the Northern District of Georgia petitioner, in company with several others, was indicted (R. 2–8) under the provisions of the Internal Revenue Code of 1939 for the substantive crimes of knowing possession and control of an unregistered still, 26 U. S. C. 2810 (count two), and engaging in the business of a distiller with intent to defraud the United States of its revenue, 26 U. S. C. 2833 (count three). Count one charged a conspiracy to defraud the United States of its liquor revenues through a scheme (a) to possess an unregistered still, 26 U. S. C. 2810; (b) to engage in the

business of distilling liquors with intent to defraud the United States of the tax imposed on liquors, 26 U. S. C. 2833; (c) to make and ferment mash for production of distilled spirits on premises other than an authorized distillery, 26 U. S. C. 2834; (d) to remove, deposit and conceal distilled spirits on which a United States tax was unpaid with intent to defraud the United States of such tax, 26 U. S. C. 3321; (e) to transport, possess, sell and transfer distilled spirits in containers lacking the required federal stamps evidencing quantity and payment of tax, 26 U. S. C. 2803; (f) knowingly to possess property intended for use in the manufacture and production of nontax paid distilled spirits, 26 U. S. C. 3115, 3116; and (g) to carry on the business of a wholesale and retail liquor dealer without paying the special tax, 26 U. S. C. 3253. All of the alleged objects of the conspiracy save "f" were punishable as felonies if charged as substantive crimes. Twenty-one overt acts were alleged during the conspiracy from August 1, 1953, to the date of the indictment, October 19, 1954. The jury was instructed that "[i]t is not necessary * * * that the Government should prove all of these overt acts, or all of these alleged purposes of the alleged conspiracy" (R. 803; Pet. 9), and that proof of a conspiracy to "violate any one or more of the provisions of law enumerated [in the indictment]" would sustain a verdict of guilty (R. 813–814; Pet. 9–10). No relevant requests to charge were made nor was any exception taken to the charge (R. 819–822; Pet. 10). The jury returned a verdict of guilty on the conspiracy

count, not guilty on the charge of possession and control of an unregistered still,[1] and no verdict as to count three which charged the carrying on of the business of distiller with intent to defraud the United States of the tax imposed on the spirits distilled. Petitioner did not seek clarification of the jury's verdict of "Guilty On Count One" (R. 828). The trial judge sentenced him to three years' imprisonment and fined him five thousand dollars (R. 830). The Court of Appeals affirmed (Pet. 7–17; R. 837–847).

Petitioner's claim that the jury may have intended to find him guilty of conspiracy to commit only the misdemeanor requires a brief summary of the evidence:

The chief government witness was one Logan, a fellow conspirator, who reported the liquor operation to the federal authorities after a dispute with petitioner (R. 113, 114). His account, corroborated by testimony of the revenue officers, included the following:

In August 1953, on release from jail after serving a "whisky sentence" (R. 33), Logan went to live at the home of his sister, petitioner's wife (R. 34). He soon commenced hauling whisky for petitioner (R. 34), and for two months made three or four trips a week hauling liquor from Dawsonville, Georgia, to Atlanta (R. 34). The truck used held approximately 500 gallons in gallon cans (R. 36). In Atlanta, Logan

[1] The trial judge had directed such a finding on this count as to all defendants because the government failed to show that there was no sign posted on the still showing that it was registered (R. 814, 819).

with others "set off" the whiskey at various customers, putting the excess in a "stash" at a garage (R. 38). He handled no money either in Dawsonville or from customers in Atlanta (R. 39–40). He received a salary of $100 a week from petitioner (R. 40). In November 1953 petitioner rented a dwelling house and chicken house near Canton, Georgia, and put up a still there (R. 41, 51). Logan helped move in the still, hauled in the whisky ingredients and hauled out the product to a second "stash" on Vinings Road (R. 42). Petitioner supervised alteration of the Vinings Road building to make it suitable for concealment of whisky (R. 63). Petitioner later rented an abandoned streetcar located on private property off a highway and placed a trailer there beside it, in which Logan lived. Logan testified that he hauled a hundred sacks of sugar at a time to the still, each weighing a hundred pounds; that he had bought the sugar on credit at petitioner's direction at a place near Cumming, Georgia (R. 46). When word of a forthcoming raid was received, petitioner with others went to the chicken house still, poured out approximately 5,000 gallons of mash and hauled the barrels into the woods. Logan later saw equipment from the still at petitioner's garage. (R. 57–58.)

In hauling materials and deliveries of liquor Logan used trucks furnished by petitioner (R. 49, 50). He described an oil tank truck specially constructed to camouflage its use for carrying whisky (R. 68–73), owned by petitioner and outfitted at petitioner's direction (R. 73, 74). Petitioner personally convoyed

truck loads of liquor acting as a lookout to spot any law enforcement officers who might be waiting in its path (R. 76, 77). Logan witnessed one payment by petitioner to a codefendant, Tatum, of $8,000, and Tatum came to the house for payment weekly (R. 78–80). Logan hauled raw materials to bootleggers in other states, exchanging it sometimes for loads of whisky (R. 82–88).

ARGUMENT

Petitioner argues that, since one of the seven alleged objects of the conspiracy was to commit a misdemeanor, he should have received only a 30 days' sentence on the theory that the jury might have found him guilty only of conspiracy to commit the misdemeanor. In relation to the evidence in this case, this contention is devoid of substance. Petitioner conceded below (Pet. 7–8) and does not now question that there was substantial evidence from which the jury could have found him guilty of a conspiracy to violate each of the seven sections alleged in the indictment. Indeed, there was no evidence of a scheme merely to possess materials intended for use in the manufacture of non-tax paid distilled spirits—the misdemeanor offense. If the jury credited the evidence at all, it necessarily had to find a conspiracy to defraud the United States by engaging in wholesale illegal traffic in liquor, including manufacture, transportation, concealment and distribution, with the possession of materials as an incidental part of the operation. All these facets of the business and the intent to defraud the United States were charged in the one count as ob-

jects of the conspiracy. A conspiracy to defraud the United States is a felony (18 U. S. C. 371, *supra*, p. 2), and each of the aforementioned steps in the scheme, other than possession, is in its substantive aspect a felony. Hence the conspiracy which the jury found that petitioner had joined (and of which the evidence showed him to be the central figure) was necessarily a conspiracy to commit a felony, for which the three-year sentence could properly be imposed.

In *Shibley* v. *United States*, 237 F. 2d 327 (C. A. 9), certiorari denied, 352 U. S. 873, three counts of the indictment charged that defendant: (1) aided and abetted the commission of burglary (a felony); (2) received, concealed, and converted property of the United States, knowing it to have been stolen; and (3) conspired to commit burglary and receive stolen government property. The jury returned no verdict on the substantive count of aiding and abetting the burglary and found, with respect to the second substantive charge, that the defendant was guilty and that the value of the property was less than $100. Under this last finding the charge was reduced to a misdemeanor. 18 U. S. C. 641. The jury also found the defendant guilty on the conspiracy count, and the trial judge imposed sentence thereon as for a felony. In upholding this sentence, the court reasoned that the jury could have found that the defendant participated in a conspiracy to commit the felony of burglary, even though he did not participate in the actual offense to a degree which would make him an aider and abettor of the substantive crime. The holding in *Shibley*

supports *a fortiori* the government's position here, for, as we have shown, in this case the conspiracy proven inevitably included agreement to commit felonies and the misdemeanor was only an incidental part thereof. See also *United States* v. *Wiesner*, 216 F. 2d 739, 742 (C. A. 2), where the indictment charged a conspiracy to commit a non-criminal offense and to defraud the United States. In *Wiesner* the same evidence went to both branches of the charge and the court held that a single verdict of guilty was properly to be taken as including a finding of a conspiracy to defraud.

Moreover, as the Court of Appeals correctly notes (Pet. 14–16), even if petitioner's contention had substance, the only relief to which he would be entitled would be a new trial. The possibility that the verdict could have been based only on the conspiracy to commit the misdemeanor did not require the court below to assume that this was the fact and to ignore the far greater probability that the conviction was based on a conspiracy to commit a felony. At most, if the verdict were too uncertain, there would have to be a new and clearer verdict. But petitioner, who sought no clarification of the verdict at the trial, disclaimed in the Court of Appeals any desire for a new trial (Pet. 16) and does not now seek that relief (Pet. 35). Having chosen to rest on the evidence and the verdict in this case, he is in no position to complain because the court imposed sentence on the basis of what the evidence clearly established, a conspiracy to commit a felony.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1957.

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